83-1549

No.

In the Supreme Court of the United States

October Term, 1983

PARK CORPORATION,
Petitioner,

vs.

NATIONAL SAVINGS AND TRUST CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in finding that Uniform Commercial Code provision 4-213 (O.R.C. §1304.19) does not bar restitutionary recovery for banks that pay non-sufficient fund checks where there is no detrimental reliance on the part of the payee.

DESIGNATION OF CORPORATE RELATIONSHIPS

The Park Corporation, filing this Petition for Certiorari as Petitioner in this proceedings, states that:

This is its original Designation of Corporate Relationships.

The Park Corporation is not owned by any parent corporation.

The Park Corporation does not have any ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

The Park Corporation does not have any affiliates.

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OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio, Eastern Division (App. pp. A9 to A16) was not reported. The opinion of the Court of Appeals for the Sixth Circuit (App. pp. A1 to A8) is recommended for full text publication but is presently unreported.

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on December 19, 1983 and copies thereof are appended to this petition in the Appendix. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

The District Court for the Northern District of Ohio had jurisdiction over this matter under 28 U.S.C. §1332.

STATUTORY PROVISIONS

Uniform Commercial Code Section 3-418 (Ohio Revised Code §1303.54) provides:

> Except for recovery of bank payments as provided in Sections 1304.01 to 1304.34, inclusive, of the Revised Code, and except for liability for breach of warranty on presentment under section 1303.53 of the Revised Code, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

Uniform Commercial Code Section 4-102(1) (Ohio Revised Code §1304.02(A)) provides:

> (A) To the extent that items within sections 1304.01 to 1304.34, inclusive of the Revised Code are also within the scope of sections 1303.01 to 1308.36, inclusive, and sections 1308.01 to 1308.36, inclusive, of the Revised Code, they are subject to the provisions of those sections. In the event of conflict the provisions of Sections 1304.01 to 1304.34, inclusive, of the Revised Code govern those of sections 1303.01 to 1303.78, inclusive, of the Revised Code, but the provisions of sections 1308.01 to 1308.36, inclusive, of the Revised Code governs those of sections 1304.01 to 1304.34, inclusive, of the Revised Code.

Uniform Commercial Code Section 4-213(1) (Ohio Revised Code §1304.19(A) provides:

> (A) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (1) paid for the item in cash;

(2) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule, or agreement; or

(3) completed the process of posting the item to the indicated account of the drawer, maker, or other person to be charged therewith; or

(4) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule, or agreement.

Upon a final payment under divisions (A)(2), (3), or (4) of this section, the payor bank shall be accountable for the amount of the item.

STATEMENT OF THE CASE

On or about December 19, 1979 Garland Carribean Corporation (hereinafter, Garland), entered into a contract with Jones and Laughlin Steel Corporation (hereinafter, J&L), for the purchase of certain mining equipment. Garland assigned the contract to Park which, on December 27, 1979, purchased the equipment from J&L. Thereafter, Park sought to resell the equipment through the efforts of Garland. Accordingly, on January 8, 1980 Garland on behalf of Park entered into a contract with DAI International Investment Corporation (hereinafter, DAI), providing for the sale of the equipment for $3,750,000.00.

DAI agreed to pay for the equipment by making a contemporaneous downpayment of $150,000.00 with the balance due by January 31, 1980. DAI made the downpayment by drawing two checks on its account at National Savings in the amount of $75,000.00 each. On January 16,

1980 Garland delivered the contract and one of the checks to Park. On the same date Park delivered the check to its bank, Central National (hereinafter CNB), with instructions to present it to National Savings "for collection." CNB complied with Park's instructions and on January 18, 1980 mailed the check to National Savings with instructions to hold it for collection and give immediate advice of payment by "wire." On January 22, 1980 Garland telephoned one Suzanne Dembrowski, an officer of National Savings, advised her of the two checks that had been drawn by DAI and requested a determination as to whether DAI maintained sufficient funds in its account to cover them. Dembrowski responded in the negative. Subsequently, Dembrowski instructed a "platform officer," who had authority over incoming checks submitted through "normal clearing procedures," to watch for presentment of DAI checks drawn against insufficient funds and to dishonor and return them, if such presentment occurred. On the same date Park's check was received by National Savings' Account Servicing Department.

When National Savings received Park's check, Caroline Corely, a National Savings employee, normally in charge of processing items for collection, was required to work in another department commencing at 9:30 a.m. Her supervisor, Sophie Holland, was assigned as a substitute. Prior to leaving the collections department, Corely opened, separated and tagged the collection items. Park's check was included in these items and was tagged "to be wired." Aware that Corely was about to leave for work in another department, Holland asked Corely whether she (Holland) could help by completing the standard procedure with regard to Park's check. Corely responded in the affirmative. Corely assumed that Holland would ascertain whether there were sufficient funds in DAI's account to

cover the check. Holland assumed that Corely had done so. In any event, neither of them made such a determination and a wire advice was given CNB providing that Park's check was paid in the amount of $75,000.00 less a $5.00 processing fee. At that time DAI had an actual checking account balance of $263.75. When National Savings learned of the payment, it requested that Park return the money. When Park refused, National Savings filed a suit in the United States District Court for the Northern District of Ohio seeking restitution of the money received by Park.

This matter was heard by the district court on cross-motions for Summary Judgment. On August 6, 1982 the district court filed a memorandum of opinion which granted Park's Motion For Summary Judgment and denied National Savings' Motion For Summary Judgment (App. pp. A9 to A16). It was the finding of the district court that the general rule bars restitutionary recovery for banks that pay non-sufficient fund checks.

National Savings appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit. On December 19, 1983, the Court of Appeals filed an opinion which reversed the decision of the district court (App. pp. A1 to A8). The focus of the Court of Appeals opinion was U.C.C. Section 4-213(1) (Code §1304.19(A)). It was the position of Park throughout the lower court proceedings that U.C.C. Section 4-213(1) bars restitutionary recovery for banks that pay NSF checks, even if the payee is not a holder in due course, nor a person who has changed his position in reliance upon the drawee's action. Even though Park's position on U.C.C. Section 4-213(1) is supported by case law, the Court of Appeals rejected Park's argument on this issue.

SUBSTANTIALITY OF THE QUESTION PRESENTED

The decision below should be reviewed because it erroneously interprets the Uniform Commercial Code as adopted in Ohio. There is a conflict between two provisions of the U.C.C., Section 3-418 and Section 4-213. Section 3-418 of the Code (O.R.C. §1303.54), which applies to all transactions involving negotiable instruments states that "payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."

Section 4-213(1) (O.R.C. §1304.19(A)) states that "[a]n item is finally paid by a payor bank when the bank has done any of the following, whichever happens first: (a) paid the item in cash. . ."

It has been the contention of Park throughout the lower court proceedings that "finally paid" as used in U.C.C. Section 4-213(A) has the same meaning as the "payment is final language in Section 3-418." It should be noted that the last sentence of U.C.C. Section 4-213(A) states that "upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item."

It is the position of Park that the latter sentence should be read as an Article Four Final-Payment doctrine by interpreting "the payor bank shall be accountable for the amount of the item" as meaning that it cannot recover payment thereafter. Moreover, because Section 4-213 does not have the restrictive provisions which limit coverage to those who detrimentally rely, it is Park's position that Section 4-213 makes a bank strictly liable as soon as it pays on a non-sufficient fund check. Furthermore, U.C.C. §4-102 makes it very clear that in case of conflict

between Articles 3 and 4, the provisions of Article 4 are to govern.

Based upon the language of U.C.C. Section 4-213, it must be concluded that National Savings is barred from recovering the $75,000.00 it paid to Park on a non-sufficient fund check. Park's position has been supported by several courts. *See, e.g., Ashford Bank v. Capital Preservation Fund, Inc.*, 544 F. Supp. 26, 28-29 (D. Mont. 1982); *Kirby v. First & Merchants National Bank*, 210 Va. 88, 168 S.E.2d 273, 275 (1969).

The question presented by this case is of great and recurring significance in the adoption and administration of the Uniform Commercial Code. The important nature of this issue has already been recognized by several state and federal courts. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon commercial transactions make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed December 19, 1983)

No. 82-3565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL SAVINGS AND TRUST CO.,
Plaintiff-Appellant,

v.

PARK CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KEITH and MARTIN, *Circuit Judges;* and SPIEGEL, *District Judge.**

BOYCE F. MARTIN, JR. *Circuit Judge.* In this diversity action, National Savings and Trust challenges the summary denial of its claim for restitution of $74,737.25 it mistakenly paid to Park Corporation on a bad check.

On January 8, 1980, Park Corporation contracted to sell some used mining equipment to DAI International Investment Corporation. The sales agent for the transaction was Garland Caribbean Corporation. As part of its down payment, DAI [2] gave Garland a check for

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*Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

$75,000 drawn on its account with the plaintiff, National Savings and Trust Company. On January 16, Garland called National Savings to determine if DAI had sufficient funds in its account to cover this check. The bank said DAI did not. That same day, Garland endorsed the check over to Park Corporation. Park Corporation then sent the check to National Savings "for collection."

On January 22, Garland once again called the bank to determine if DAI had sufficient funds in its account to cover the check. Once again, the bank said DAI did not.[1] Moreover, on this occasion, the banking employee who received the inquiry went to the bank's "platform officer" and notified him not to accept any DAI checks drawn on insufficient funds. Unfortunately for the bank, the platform officer only saw checks arriving through normal banking channels and not those coming in "for collection."

DAI's check arrived at the bank that same day. However, the employee who normally processed "for collection" checks was scheduled to work in another department that day. Prior to her departure, she did manage to open the incoming mail, including the DAI check. Her supervisor then volunteered to help out by taking the DAI check to the wire room for payment. Neither employee followed the bank's standard procedure and checked DAI's account to ensure that it held sufficient funds to cover the check. Each assumed that the other had done so. As a result, the check was paid even though DAI had only $263.75 in its account.

On January 28, 1980, after discovering its mistake, National Savings asked Park Corporation to return the $75,000. Park refused and National Savings subsequently brought

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1. There is no evidence Park was ever aware of Garland's phone conversations with the bank.

this lawsuit. On motion for summary judgment by the defendant, the court found for Park on the grounds that National Savings had made an improvident extension of credit and that the [3] bank was in a better position to know the true facts and to guard against mistakes. We disagree.

The basic law of restitution in Ohio, the state whose law controls, is summarized in *Firestone Rubber & Tire Co. v. Central Nat'l Bank of Cleveland*, 159 Ohio St. 423, 112 N.E.2d 636 (1953). The *Firestone* case held that money paid to another by mistake is recoverable unless the other person has changed his position in reliance on the payment. This rule applies even if the mistake was the result of negligence.

Park Corporation attempts to circumvent the holding in *Firestone* by arguing that banks are not protected by normal restitutionary principles when they pay an insufficient funds (NSF) check. There is some support for this position. *See, e.g., Spokane & Eastern Trust Co. v. Huff*, 63 Wash. 225, 115 P. 80 (1911); 7 Zollman, *The Law of Banks and Banking* § 5062 (1936). Nonetheless, this rule has not been universally applied, *see, e.g., Manufacturers Trust Co. v. Diamond*, 186 N.Y.S.2d 917, 919 (App. Div. 1959), and Park has not cited, nor have we been able to find, any Ohio cases adopting this rule. Moreover, it is questionable whether such a doctrine, if ever in existence, would survive the subsequent enactment of the Uniform Commercial Code in Ohio and the particular provisions applicable to the facts of the present case.

Park Corporation next argues that *Firestone* does not control because National Savings' payment was not a mistake but rather a knowing extension of credit. Park relies heavily on the New Jersey case of *Demos v. Lyons*, 151

N.J. Super. 489, 376 A.2d 1352 (Law Div. 1977). The factual circumstances of *Demos*, however, are quite distinct from the present case. In *Demos*, the bank actually examined the customer's account, realized the customer had insufficient funds to cover the check, yet paid the check anyway. The bank did not want to embarrass its customer and it hoped that he had made a late deposit to cover the check which would appear on the next day's balance sheet. No such deposit was ever made. In our [4] case, National Savings never intended to make good on an NSF check. The platform officer had been notified not to pay out on DAI's check. The "for collection" employees were operating under standing orders to check balances before paying a check and never to pay on an NSF check. Despite all these precautions, the check was paid. At no time, however, did the employees making the payment decision know that DAI's account had insufficient funds to cover the check.

Park's next contention is that the Uniform Commercial Code as adopted in Ohio bars restitutionary recovery for banks that pay NSF checks. This argument focuses on an apparent conflict between two provisions of the U.C.C., section 3-418 and section 4-213. Section 3-418 of the Code (O.R.C. § 1303.54), which applies to all transactions involving negotiable instruments, states that "payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."[2] Because a holder in due course is simply a special type of detrimental relier, this section is basically a codification of restitutionary principles established in *Firestone*. Of-

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2. Section 3-418 also has special exceptions not applicable here which allow banks and other acceptors and payors to recover where a check has a forged endorsement.

ficial Comment 3 to this section makes clear that if there is no detrimental reliance by the payee, then recovery of payment is permitted.

Park Corporation argues that another provision of the U.C.C., section 4-213, establishes a special non-recovery rule for banks which mistakenly pay on a bad check. Section 4-213(1) (O.R.C. § 1304.19(A)) states that "[a]n item is finally paid by a payor bank when the bank has done any of the following, which ever happens first: (a) paid the item in cash. . . ." Park contends that "finally paid" as used in this section has the same meaning as the "payment is final" language in section 3-418, namely restitutionary recovery is no [5] longer possible. Moreover, because section 4-213 does not have the restrictive provisions which limit coverage to holders in due course or those who detrimentally rely, Park argues that section 4-213 makes a bank strictly liable as soon as it pays on an NSF check.[3] Furthermore, U.C.C. § 4-102 provides that, in case of conflict between Articles 3 and 4, the provisions of Article 4 are to govern. Thus, Park argues, National Savings is barred from recovering the $75,000.

At first glance, Park's argument has a certain appeal. That is not surprising because it is based in large part on the work of White & Summers, whose treatise, *Uniform Commercial Code* (2d ed. 1980), is generally considered the leading authority on commercial transactions. *Id.* at 613-617. Several courts have also reached the same conclusion. *See, e.g., Ashford Bank v. Capital Preservation Fund, Inc.*, 544 F. Supp. 26, 28-29 (D. Mont. 1982); *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273,

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3. Park agrees with White & Summers, *Uniform Commercial Code* 617 (2d ed. 1980), that there must be a "good faith" requirement read into section 4-213 so that payors acting fraudulently do not benefit.

275 n.4 (1969). *Confer Bartlett v. Bank of Carroll*, 218 Va. 240, 237 S.E.2d 115, 119 (1977).

Nonetheless, opinion on the matter is by no means uniform. Other writers, *see* H. Bailey, *Brady on Bank Checks* § 14.20 at 14-32 (5th ed. Supp. 1983); B. Clark, *The Law of Check Deposit* § 5.3[3] (2d ed. 1981), and other courts, *see Demos v. Lyons*, 151 N.J. Super. 489, 376 A.2d 1352 (Law Div. 1977); *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589, 601-02 (Ky. App. 1977), have argued that banks retain their restitutionary rights with respect to mistaken payment of NSF checks. Our own analysis of the Code convinces us that the latter group is correct and that section 4-213 does not expand the final payment doctrine to bar recovery by payor banks from payees who have not detrimentally relied. In our analysis, we rely heavily on the official Comments to sections 3-418 and 4-213. While these comments to the Code [6] are not part of enacted law, they are a very helpful guide to construing the meaning of Code provisions. *See In re Augustin Bros. Co.*, 460 F.2d 376, 380 (8th Cir. 1972).

An examination of the comments to section 3-418 makes clear both that this section was intended to apply to "the payment of overdrafts, or any other payment made in error as to the state of the drawer's account," Comment 2, and that restitutionary recovery was to be denied only when the payee had relied on the payment. "If no value has been given for the instrument, the holder loses nothing by the recovery of the payment, . . . and it is not entitled to profit at the expense of the drawee. . . ." Comment 3.

The only mention of section 4-213 occurs in Comment 5, where the Code drafters point out that the provisions of section 3-418 do not apply until payment is final as defined in section 4-213. This comment suggests a method for re-

solving the apparent conflict between section 3-418 and 4-213. As the court in *Demos v. Lyons* put it, section 4-213 "is oriented toward time of payment, not legal effect of payment." 376 A.2d at 1356. The purpose of section 4-213 is "to determine *when* settlement for an item or other action with respect to it constitutes final payment." Comment 1, § 4-213 (emphasis added). Section 4-213 determines *when* the final payment rule of section 3-418 comes into effect, not *what* that rule is supposed to mean. Further support for this position comes from the remaining comments to section 4-213. Comment 1 states "final payment is important" because it helps determine "priorities between items and notices, stop orders, legal process and setoffs, [because it] is the 'end of the line' in the collection process, [and because it] is the point at which many provisional settlements become final." The remaining comments discuss such arcane banking matters as posting, provisional settlements, and midnight deadlines. At no point does any comment to section 4-213 mention the effect this section is [7] supposed to have on the restitutionary rights of banks. Thus, it seems evident that the drafters of the Code never intended for section 4-213 to supercede section 3-418, and we can see no reason to adopt a position contrary to that intent.

As further support for our decision, we feel obliged to note that White & Summers, the authorities most relied on for the contrary proposition, now appear to have changed their minds. Professor White, in a note written for a colleague's textbook, has recanted and now supports the view that section 4-213 makes no substantive change in the law of restitution as applied to banks. *See* D. Epstein & J. Martin, *Basic Uniform Commercial Code* 514 (2d ed. 1983). Presumably the next edition of his treatise will reflect this change in thinking.

Park Corporation next contends that, even if section 3-418 controls, it is both a holder in due course and one who has changed its position in reliance on National Savings' payment and therefore should be allowed to retain the $75,000. We find no support in the record for either proposition. On the holder in due course issue, Park does not qualify because it did not give value for the check. It was still in possession of the machinery it had contracted to sell to DAI. Although it had promised to deliver the equipment to DAI, such an executory promise does not constitute value. U.C.C. § 3-303, Comment 3. Park Corporation is, of course, no longer required to carry out its promise because DAI has breached its agreement to pay.

As for detrimental reliance, Park contends that it paid $37,500 as a commission to Garland Corporation on the assumption that DAI's check was good. However, Park did not pay Garland until February 13, 1980, two weeks after National Savings had informed Park that it had paid the DAI check by mistake and that it wanted Park to return the money. Section 3-418 only makes payment by the bank final in favor of someone who has "*in good faith* changed his position in reliance on the payment." Once aware of the insufficiency in funds, [8] Park could not have "in good faith" paid Garland $37,500 in reliance on that check. Park also alleges it paid rent for storing the equipment and painted the equipment in reliance on the payment. There is no evidence to support these allegations.

Accordingly, the decision of the district court is reversed.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed August 6, 1982)

Case No. C81-502

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL SAVINGS AND TRUST CO.,
Plaintiff,

v.

PARK CORPORATION,
Defendant.

MEMORANDUM OF OPINION

On March 24, 1981 plaintiff, National Savings and Trust Company (hereinafter, National Savings), filed the above-captioned case alleging that it was entitled to restitution of $74,737.25 erroneously paid to the defendant, Park Corporation (hereinafter, Park). Jurisdiction is invoked under 28 U.S.C. § 1332. The case is currently before this court on cross-motions for summary judgment. For the reasons which follow Park's motion is granted and National Savings' motion is denied. Fed. R. Civ. P. 56.

On or about December 19, 1979 Garland Carribean Corporation (hereinafter, Garland), entered into a contract with Jones and Laughlin Steel Corporation (hereinafter, J & L), for the purchase of certain mining equipment. Garland assigned the contract to Park which, on December 27, 1979, purchased the equipment from J & L. Thereafter, Park sought to resell the equipment through

the efforts of Garland. Accordingly, on January 8, 1980 Garland on behalf of Park, entered into a contract with DAI International Investment Corporation (hereinafter, DAI), providing for the sale of the equipment for $3,750,000. DAI agreed to pay for the equipment by making a contemporaneous downpayment of $150,000 with the balance due by January 31, 1980. DAI made the downpayment by drawing two checks on its account at National Savings in the amount of $75,000 each. On January 16, 1980 Garland delivered the contract and one of the checks to Park. On the same date Park delivered the check to its bank, Central National (hereinafter CNB), with instructions to present it to National Savings "for collection." CNB complied with Park's instructions and on [2] January 18, 1980 mailed the check to National Savings with instructions to hold it for collection and give immediate advice of payment by "wire." On January 22, 1980 Garland telephoned one Suzanne Dembrowski, an officer of National Savings, advised her of the two checks that had been drawn by DAI and requested a determination as to whether DAI maintained sufficient funds in its account to cover them. Dembrowski responded in the negative. Subsequently, Dembrowski instructed a "platform officer," who had authority over incoming checks submitted through "normal clearing procedures," to watch for presentment of DAI checks drawn against insufficient funds and to dishonor and return them, if such presentment occurred.[1] On the same date Park's check was received by National Savings' Accounts Servicing Department.

National Savings' standard procedure upon receipt of a check for collection was as follows:

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1. According to National Savings, "normal collection procedures" concern only checks which are processed through the Federal Reserve system and not those for which payment by "wire" is requested.

a. The person working collections would open the mailings and separate those collections for "wire" from those which were not for "wire."

b. Those items for which wire advice of payment was requested would be tagged with a slip of paper, "to be wired."

c. All items would be checked against the drawer's account balance to see if there were sufficient funds available for payment of the item.

d. If sufficient funds were available, then a "hold" would be put against the account in the amount of the item; if sufficient funds were not available, then the item would be set aside for review on the following day (or returned if it had been checked for ten days).

e. If sufficient funds were available and had been held, then the item would be paid, either by check drawn upon [National Savings] or by "wire" advice to the collecting bank if requested.

f. "Wire" advice would be given by Western Union telex lines, and a "wire" log would be kept for [National Savings] files.

Plaintiff's Brief in Support of Motion for Summary Judgment, pp. 4, 5.

[3] When National Savings received Parks' check, Caroline Corely, a National Savings employee, normally in charge of processing items for collection, was required to work in another department commencing at 9:30 a.m. Her supervisor, Sophie Holland, was assigned as a substitute. Prior to leaving the collections department, Corely opened, separated and tagged the collection items. Park's check was included in these items and was tagged

"to be wired." Aware that Corley was about to leave for work in another department, Holland asked Corely whether she (Holland) could help by completing the standard procedure with regard to Park's check. Corely responded in the affirmative. Corely assumed that Holland would ascertain whether there were sufficient funds in DAI's account to cover the check. Holland assumed that Corely had done so. In any event, neither of them made such a determination and a wire advice was given CNB providing that Park's check was paid in the amount of $75,000 less a $5.00 processing fee. At that time DAI had an actual checking account balance of $263.75. When National Savings learned of the payment, it requested that Park return the money. When Park refused, National Savings filed this action.

National Savings claims that it is entitled to the money paid to Park under the equitable doctrine of restitution. It asserts that such a holding is mandated by *Firestone Rubber & Tire Co. v. Central National Bank*, 159 Ohio St. 423, 112 N.E.2d 636 (1953). In *Firestone*, the Ohio Supreme Court held that:

> The general rule is that money paid under *the mistaken supposition of the existence of a specific fact which would entitle the payee to the money*, which money would not have been paid had it been known to the payer that the fact did not exist, may be recovered.

Syllabus 2 of the Opinion (Emphasis added). It is unquestioned that when money is paid by mistake which relates to whether the payee is entitled to the money, the payor is permitted to recover under the equitable doctrine of restitution if the payee has neither given any value in exchange for the money nor detrimentally changed his

position in reliance on it. The rule is appropriate in such circumstances because the payee has no right to the money in the first instance. The facts in this case, however, are distinguishable from those before the Ohio Supreme Court in *Firestone*. In that case, Firestone agreed to purchase sleds from the Stan Wood Company. In exchange for an extension of credit, the Stan Wood Company assigned the contract to Central National [4] Bank. The Stan Wood Company fraudulently reproduced purchase invoices for sleds it had not manufactured and delivered them to the bank which billed Firestone. Firestone paid the bank until it (Firestone) discovered the fraud. Thereafter, Firestone sought to recover the money. The Ohio Supreme Court permitted recovery because the bank *was not entitled* to the payments. The court reasoned that since the Stan Wood Company was not entitled to the money because of fraud, its assignee bank also was not entitled.

In the present case National Savings admits that a valid contract for the sale of equipment existed between DAI and Park. Therefore, Park was entitled to the money paid pursuant to the contract. Since Park was so entitled, the Ohio Supreme Court's decision in *Firestone* is not controlling and the only question presented to this court is whether it is equitable to permit Park to retain the money. For the reasons which follow the court holds that the question must be resolved in the affirmative.

In *Demos v. Lyons*, 151 N.J. Super. 489, 376 A.2d 1352 (1977), a bank filed an action against an attorney representing sellers of certain real estate and a business located thereon alleging that the attorney was unjustly enriched when the bank paid a $25,000 check drawn by its customer on an account which contained insufficient funds. The evidence established that: (1) when the check was presented to the bank its records disclosed that its customer

had insufficient funds in his account to cover it; (2) "[i]t was too late in the day to learn from the bank's computer whether [its customer] had made a deposit to his account that morning to cover the check, and the bank was unable to reach him by telephone to determine whether he had done so," 376 A.2d at 1355 and (3) "[s]o as not to embarrass their customer in this important transaction, the bank officers decided to pay the check." *Id.* Subsequently, the bank determined that its customer did not make a deposit to cover the check. The court held as follows:

> *From its own evidence in the case at bar, the bank here paid with full knowledge that, according to its bookkeeper, the buyers' account would thereby be substantially overdrawn. It thus assumed the risk of the buyers' credit. If computer corroboration of the account balance was necessary, then by its established procedures the bank either prematurely shut down the computer for the day or prematurely chose to pay. In either event, it assumed the risk that Demos did not cover the check and it thereby waived any claim of a mistaken belief that he had.*

[5] Restatement, Restitution, § 11(1) at 42 (1937), provides in part, "A person is not entitled to rescind a transaction with another if * * * he * * * intended to assume the risk of a mistake for which otherwise he would be entitled to rescission and consequent restitution." The court in *George J. Meyer Mfg. Co. v. Howard Brass & Copper Co.*, 246 Wis. 558, 18 N.W. 2d 468, 474 (Sup.Ct.1945), held that restitution is denied a payor who assumed the risk of mistake. See also, *Rabbit Ear Cattle Company v. Frieze*, 80 N.M. 203, 453 P.2d 373, 374 (Sup.Ct.1969). *The bank's "mistake" was an improvident extension of credit to its customers. This is not a mistake of fact warranting restitution.*

> *Whether the bank is considered to have paid despite learning from its bookkeeper the insufficiency of the buyers' account from its computer, it assumed the risk that the account was insufficient and thereby waived any claim for restitution based on mistake.*

376 A.2d at 135, [sic] 1358 (Emphasis added).

In this case Dembrowski had "full knowledge" that DAI's account would be substantially overdrawn if National Savings accepted the check. *Demos v. Lyons, supra,* at 1357. She transmitted this information to the wrong personnel. In addition, Corely and Holland were negligent in failing to ascertain the true balance in DAI's account. It is unquestioned that this is a case of a unilateral mistake on behalf of National Savings. When such a mistake occurs the equities weigh in favor of the payee because the bank occupies a superior position to control the circumstances and know or ascertain the true facts. *Citizens & Southern National Bank v. Youngblood,* 135 Ga. App. 638, 219 S.E.2d 172 (1975). Therefore, this court holds that National Savings payment of the check constituted an "improvident extension of credit." *See*: *Demos v. Lyons, supra. See also*: *Citizens & Southern National Bank v. Youngblood, supra,* in which the court reasoned:

> . . . The drawer of a check, and not the holder who receives payment, is primarily responsible for the drawing out of funds from a bank. An overdraft is an act by reason of which the drawer and not the holder obtains money from the bank on his check. *The holder therefore in the absence of fraud or express understanding for repayment, has no concern with the question whether the drawer has funds in the bank to meet the check. The bank is estopped, as against him, from claiming that by its acceptance an overdraft occurred. A mere mistake is not suf-*

> *ficient to enable it to recover from him. Banks cannot always guard against fraud, but can guard against mistakes.* It is therefore the general rule, sustained by almost universal authority, that a payment in the ordinary course of business of a check by a bank on which it is drawn under the mistaken belief that the drawer has funds in the bank subject to such check is not such a payment under a mistake of fact as will permit the bank to recover the money so paid from the recipient of such payment.

(Citations omitted) (Emphasis added).

[6] Fed. R. Civ. P. 56(c) provides that summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Since National Savings has failed to demonstrate any genuine issue of material fact and the court finds that the equities in the case weigh in favor of Park, Park's motion for summary judgment is granted and that of National Savings is denied. *See: Smith v. Hudson*, 600 F.2d 60 (6th Cir.), *cert. denied*, 444 U.S. 986, 100 S. Ct. 495 (1979); *Bryant v. Commonwealth of Kentucky*, 490 F.2d 1273 (6th Cir. 1974); *Daily Press Inc. v. United Press Int'l.*, 412 F.2d 126 (6th Cir.), *cert. denied*, 396 U.S. 990, 90 S. Ct. 480 (1969).

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

Case No. C81-502

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL SAVINGS AND TRUST CO.,
Plaintiff,

v.

PARK CORPORATION,
Defendant.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 19, 1983)

No. 82-3565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL SAVINGS AND TRUST COMPANY,
Plaintiff-Appellant,

v.

PARK CORPORATION,
Defendant-Appellee.

Before: KEITH and MARTIN, *Circuit Judges;* and SPIEGEL, *District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized

below, and that execution therefor issued out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

Attest:

/s/ GARY MCCARTHY
Deputy Clerk

END OF DOCKET